Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-201

CITY OF RICHMOND, VIRGINIA

Appellant

v.

UNITED STATES OF AMERICA and
WILLIAM B. SAXBE, ATTORNEY GENERAL, and
CURTIS HOLT, SR., et al., and
CRUSADE FOR VOTERS OF RICHMOND, et al.,

Appellees

RESPONSE OF HOLT, ET AL APPELLEES
TO MEMORANDUM FOR THE
FEDERAL APPELLEES

OPINION BELOW

The opinion of the Three-judge District Court is reported at 376 F. Supp. 1344. References to that opinion herein are to be found in the appendix to the Appellant's Jurisdictional Statement and are designated as (J.S. App. B, p._).

Jurisdiction

The judgment of the District Court (J.S. App. A) was entered on June 6, 1974 and an appeal therefrom was noted by ap-

pellant on July 15, 1974 invoking the jurisdiction of this Court under 42 U.S.C. 1973c.

Factual Correction to Federal Appellees Statement

The federal appellees erroneously state that:

> The [Fourth Circuit] Court of appeals . . . reversed en banc (Butzner and Winter, J.J. dissenting) on the ground that the annexation was not entered into for the purpose of diluting black voting rights. 459 F2d 1093 (C.A.4).

There was no reversal of the findings of fact of the District Court in Holt I by the Court of Appeals for the Fourth Circuit. Instead, the Fourth Circuit swept aside any consideration of racial motivation with the following holding:

> Facially constitutional legislation may not be stricken because of suspect legislative motivation.

As Judge Winter noted in his lucid dissent in that case:

> The opinion of the majority may be read in vain for any adequate discussion of these findings [of invidious racial motivation] and any demonstration that they are clearly erroneous... The majority simply takes the position that the evidence to support them is extraneous to the issue.

The Fourth Circuit, however, did clearly recognize that its decision had no bearing whatever on the outcome of any suit that might thereafter be brought under §5 of the Voting Rights Act and expressly so stated after having queried the parties on this question, including the City of Richmond, all of whom unreservedly agreed that the Voting Rights Act was a separate and distinct remedy not involved in Holt I. 459 F2d at 1100.

Discussion

I

THE FEDERAL APPELLEES HAVE NO RIGHT TO A REMAND OF THE INSTANT CASE SIMPLY BECAUSE THEIR FORMER TRIAL STRATEGY MET WITH FAILURE

The federal appellees have heretofore endorsed the compromised annexation cum ward plan of the appellant despite the overwhelming and voluminous evidence that the appellant adopted both the compromised annexation and its engrafted ward plan out of a desire to perpetuate its white-dominated political control of its own black citizens. Now, however, appellees' arguments appear to reflect a change of position. The federal appellees no longer deny the appellant's invidious motivation relative to both the annexation and its engrafted ward plan, but ask this Court to overlook that motivation on the ground that these appellees have belatedly discovered a possible benefit to school integration flowing from the illegal and racist annexation. This might well be called the "silver lining" theory of civil rights enforcement.

While the federal appellees, who were parties below, assert that "[e]vidence of this nature could have been offered at trial had it then been deemed pertinent", they offer no excuse whatever for having failed to offer such evidence and they cannot point to anything in the record of the Court below which can be construed as having excluded such evidence. The government has no right to a remand of a case simply because its trial strategy when viewed in retrospect appears to have been defective.

It is at once both insulting and incredible for the federal appellees to imply that they overlooked the possibility of introducing such evidence below when they now can claim that the mere suggestion that there may be such evidence is sufficient to warrant a vacation of the judgment below and a remand of this case. Is it is possible that the federal appellees then recalled, and have since forgotten, that the right to vote is "...a fundamental political right, because preservative of all rights"? Yick Wo v. Hopkins 118 U.S. 356, 370 (1886).

II

AN INVIDIOUSLY MOTIVATED, PATENTLY ILLEGAL CHANGE IN VOTING PROCEDURE CANNOT BE TOLERATED MERELY BECAUSE IT MAY INADVERTENTLY AMOUNT TO A TOKEN FORM OF SCHOOL CONSOLIDATION NOT OTHERWISE CONSTITUTIONALLY MANDATED

The federal appellees suggest that a deliberately contrived and patently illegal assault upon the voting rights of the remaining appellees should be denied its statutory remedy because the federal appellees,who neither live, vote nor educate their children in Richmond,deem the possible enhancement of school intergration of greater importance. The black citizens of Richmond, however, have chosen, wisely, not to entrust their welfare to the caprice of the federal appellees and prefer instead to rely upon the exercise of the franchise in the manner and to the extent guaranteed them by the Voting Rights Act.

In Bradley v. School Board, 462 F2d 1058, 1069 (C.A. 4 1972), the Fourth Circuit held that state-imposed segregation had been "completely removed" in the appellant's public schools and that consolidation of its school system with those of two surrounding,

overwhelmingly white counties was not constitutionally mandated in order to achieve a better racial balance in appellant's schools. This Court affirmed the judgment of the Fourth Circuit. sub nom. School Board v. State Board of Education, 412 U. S. 92 (1973).

It would be absurd to decide on the one hand that school consolidation cannot be affirmatively mandated in order to achieve school integration while deciding on the other that an invidiously motivated and economically unsound annexation adopted and implemented in patent violation of §5 of the Voting Rights Act can be preserved because of the mere possibility that it may, to some unspecified degree, promote school integration. This ranks as the most insulting expression of the federal appellees' benign neglect. Inasmuch as the overwhelming and continually increasing majority of Richmond's public school students are black, there is every reason to believe that the interests of these children would be better served by giving back to their parents their effective voice in local government, including the school system, than by merely adding to the schools' rolls a statistically inconsequential number of white students. Those who have heretofore opposed school consolidation should not advocate it in a piecemeal fashion at the expense of the voting rights of Richmond's black citizens.

III

THE FEDERAL APPELLEES WOULD TRANSFER THE BURDEN IMPOSED BY §5 OF THE VOTING RIGHTS ACT FROM THE APPELLANT TO THE COURT BELOW

Implicit in the federal appellees'argument is the belief that on some ground or another the Court below should have ap-

proved the compromised annexation cum ward plan regardless of how miserably appellant failed to meet the burden imposed upon it by the Voting Rights Act. All the better, argue federal appellees in effect, if the Court below can fasten on some seemingly racially benign and liberal polestar such as school integration. Ultimately, the federal appellees only chide the Court below for not finding some non-racist reason for sustaining a thoroughly racist and illegal voting change. The very argument of the federal appellees implicitly recognizes that the appellant was unable to meet, and failed utterly to meet, the burden of proof imposed upon it by §5 of the Voting Rights Act. Nevertheless, these appellees urge this Court to further prolong this snail-paced litigation while the Court below struggles to do for the appellant what appellant was unable to do for itself.

IV

IN THE CIRCUMSTANCES OF THE INSTANT CASE IT WAS ENTIRELY APPROPRIATE FOR THE COURT BELOW TO INSIST THAT ANY WARD PLAN ADOPTED BY APPELLANT EFFECTIVELY ELIMINATE DILUTION OF BLACK VOTING POWER CAUSED BY THE COMPROMISED ANNEXATION

The federal appellees take issue with the remark of the Court below that the appellant would have to show that the proposed ward plan "...not only reduced, but also effectively eliminated, the dilution of black voting power caused by the annexation." (J.S. App. B, p. 206). But the federal appellees fail to address themselves to this remark in its full context. For example, in a footnote accompanying its remark the Court below recognized that in a benign, non-racially motivated an-

nexation a less stringent test of the extent to which black vote dilution must be cured is appropriate:

> The Petersburg court was fully aware that the standard "calculated to neutralize to the extent possible" which it established for annexations not motivated by a discriminatory purpose requires a city to minimize but not necessarily to remove entirely any dilution of black voting power caused by the annexation. Id [City of Petersburg, Va. v. United States, D.D.C., 354 F. Supp.] at 1031. (J.S. App. B, p.20b, footnote 46).

Further, the literal terms of the Voting Rights Act require proof by the state or political subdivision that its change in voting practice or procedure "...does not have the purpose and will not have the effect of denying or abridging the right on account of race or color...." A relaxation of this statutory standard was permitted in Petersburg, supra, only because that particular annexation was adopted without a scintilla of any impermissible racial motivation, was desired by a majority of that city's black and white citizens and was of demonstrable economic and administrative benefit to the city as a whole.

By contrast, there is here a well documented finding that the instant, compromised annexation was adopted and hastily implemented as a deliberate and purposeful scheme to dilute the black vote, was subject to deep and widespread opposition from Richmond's black citizens and was devoid of any significant counterbalancing economic and administrative benefits. In these contrasting circumstances, it would have been wholly inappropriate and at odds with equity's most basic principles for the Court below to countenance any significant degree of dilution of the black vote. The Court below stressed the genuine distinction between the two cases in stating:

> We think that when such a city [,i.e., Petersburg,] demonstrates that its boundary expansion is not motivated by a desire to dilute black voting power, a ward plan calculated to minimize any dilution that could occur should, as stated in Petersburg, save the annexation from illegality under Section 5. However, when such a city [,i.e., Richmond,] violates the Voting Rights Act by proceeding without approval of the Attorney General or this Court, with annexation of a large number of white citizens for the purpose of diluting the vote of its black citizens, an extra burden rests on that City to purge itself of discrimminatory taint as well as to show that the annexation will not have prohibited effect.

It is as though the Court were saying that one whom after a fair hearing has been found guilty no longer enjoys the presumption of innocence. This is an entirely reasonable proposition. Only vis a vis the very dissimilar Petersburg case was the appellant here placed under an "extra burden".

V

INASMUCH AS APPELLANT FAILED TO MEET EVEN THE RELAXED PETERSBURG STANDARD OF CORRECTING BLACK VOTING POWER DILUTION, THE INCLINATION OF THE COURT BELOW TO IMPOSE A MORE STRINGENT STANDARD ON APPELLANT CONSTITUTES, AT THE MOST, HARMLESS ERROR

In any event, the question of whether appellant should have been required to effectively eliminate entirely the deliberately contrived dilution of the black vote is absolutely mooted by the record below. That record establishes that the appellant's ward plan was drawn without reference to the racial living patterns in the City of Richmond by an individual whose only direction from appellant was to "keep the wards within a four to five per cent variance from population equality." (J.S. App. 28b). It was, then, not surprising that the appellees Crusade for Voters of Richmond, et al were able to conceive and present a ward plan

that went much further than did appellant's plan in preserving black voting strength. (J.S. App. 29b-30b).

The contrasting effectiveness of these plans, let alone the appellant's admission that it ignored its own racial living patterns in drafting its ward plan, warranted the Court below in finding "...that the white political leadership presently in control of Richmond adopted the ward system for the purpose of doing what they could to maintain the dilution of the Black vote produced by annexation." (J.S. App. 26b-27b). Since appellant failed, and failed deliberately, to measure up to the relaxed Petersburg standard of adopting a plan "calculated to neutralize to the extent possible" its contrived black vote dilution, it is hardly situated to complain because the Court below may have been inclined to adopt a more strigent standard. The application of a more stringent standard to appellant, conceding arguendo that it would have been wrong, would have been error of the most harmless sort. In stating "...we do not believe black voters are entitled to the substantially disproportionate majority representation that the opinion below apparently requires," the federal appellees exceed the bounds of mere advocacy. What the Court below did say was simply that, "there is good reason to think that blacks would have a greater opportunity to elect five [controlling] councilmen responsive to their concerns and interests in an at-large system within Richmond's old boundaries than in a ward system operating within the expanded boundaries [emphasis supplied]." Further, the black citizens of Richmond are not before this Court cravenly begging

to be given a disproportionate representation in the franchise. Rather these citizens are seeking as they have for the past four (4) years, to be accorded the protection of the Voting Rights Act for the preservation of their franchise. No case could better illustrate than the instant one the wisdom of Congress in passing that Act or speak more eloquently to the need for the Act's prompt and unequivocal implementation by the judiciary.

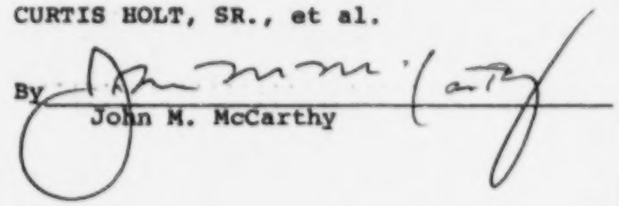
Conclusion

In sum, the federal appellees have failed to do anything more than inadvertently reveal a disappointment with their own trial strategy below. Neither the federal appellees nor the appellants have been able to point to any error in the record of the Court below or to present this Court with a question of substance, much less a substantial question. The Petersburg decision, which this Court affirmed, is an adequate guideline for any municipal annexation pursued in good faith and in accordance with the procedural requirements of the Voting Rights Act. Dignifying appellant's shabby record of mala fides in its pursuit of the compromised annexation by a grant of plenary review would only encourage other covered municipalities in the very sort of chicanery that §5 of the Voting Rights Act was designed to prevent. It would also serve to callously and needlessly delay still longer the free and untrammelled exercise of the franchise by all of Richmond's citizens.

For the reasons heretofore stated this appeal should be dismissed or, in the alternative, the judgment of the Court below should be affirmed.

Respectfully submitted

CURTIS HOLT, SR., et al.

By 
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CERTIFICATE OF SERVICE

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